

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

ERIE COUNTY ENVIRONMENTAL
COALITION, PENNENVIRONMENT,
INC. and THE GAIA DEFENSE LEAGUE,
Plaintiffs

v.

MILLCREEK TOWNSHIP SEWER
AUTHORITY AND MILLCREEK
TOWNSHIP,
Defendants

CIVIL ACTION NO. 05-59 ERIE
ELECTRONICALLY FILED
JUDGE COHILL

**MOTION TO SUPPLEMENT DEFENDANTS'
MOTION FOR SUMMARY JUDGMENT AND DEFENDANTS'
RESPONSE TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT**

Defendants MILLCREEK TOWNSHIP SEWER AUTHORITY and MILLCREEK TOWNSHIP, by and through their attorneys, MacDonald, Illig, Jones & Britton LLP, hereby file this Motion to Supplement Defendants' Motion for Summary Judgment and Defendants' Response to Plaintiffs' Motion for Summary Judgment, and states the following in support thereof:

1. On March 31, 2006, Defendants Millcreek Township Sewer Authority ("MTSA") and Millcreek Township ("Millcreek") filed a Motion for Summary Judgment on the claims raised by Plaintiffs Erie County Environmental Coalition, PennEnvironment, Inc. and the Gaia Defense League (collectively referred to as the "Plaintiffs") in this citizen suit action under

Section 1365 of the Clean Water Act ("CWA"), 33 U.S.C. § 1365. On that same date, Plaintiffs also filed a Motion for Summary Judgment.

2. On March 31, 2006, Defendants MTSA and Millcreek filed the following documents relevant to their Motion for Summary Judgment:

- (a) Concise Statement of Material Facts in Support of Defendant's Motion for Summary Judgment;
- (b) Appendix to Defendants' Motion for Summary Judgment;
- (c) Affidavit of George W. Riedesel; and
- (d) Brief in Support of Defendants' Motion for Summary Judgment.

3. On April 20, 2006, in response to Plaintiffs' Motion for Summary Judgment, MTSA and Millcreek filed the following:

- (a) Responsive Concise Statement of Defendants Millcreek Township Sewer Authority and Millcreek Township;
- (b) Appendix to Responsive Concise Statement of Defendants Millcreek Township Sewer Authority and Millcreek Township;
- (c) Brief in Opposition to Plaintiffs' Motion for Summary Judgment on All Claims; and
- (d) Supplemental Affidavit of George W. Riedesel.

4. Defendants seek this Honorable Court's permission to file supplements to the above-listed documents to incorporate events that have occurred since the filing of Defendants' Motion for Summary Judgment and Defendants' Response to Plaintiffs' Motion for Summary Judgment.

5. In their Complaint, Plaintiffs allege seven (7) discharges from the 51st and 52nd Streets and Zimmerly Road Pumping Station between August 2000 and September 9, 2004;

Plaintiffs allege three (3) discharges from the Larchmont and Beaver Street Pumping Station between February 1, 2002 and September 9, 2004; and Plaintiffs allege three (3) discharges from the Church and Patton and Pershing Street Pumping Stations between April 14, 2002 and September 9, 2004.

6. At the time Plaintiffs filed suit, MTSA and Millcreek already had entered into a Consent Order and Agreement ("COA") with the Pennsylvania Department of Environmental Protection, which required MTSA and Millcreek to take actions to stop the overflows at these locations.

7. In a Motion for Summary Judgment filed on March 31, 2006, Defendants MTSA and Millcreek moved for summary judgment on the injunctive relief and civil penalties sought as a result of these alleged discharges.

8. At the time MTSA and Millcreek filed their Motion for Summary Judgment, some of the work required by the COA had been completed, while some of the work was underway, but not completed.

9. Subsequent to the filing of its Motion for Summary Judgment, the following events have occurred that further support MTSA's and Millcreek's Motion for Summary Judgment.

10. Since the filing of the Motion for Summary Judgment on March 31, 2006, there have been no discharges at these locations. Thus, there have been no discharges at these locations since September 9, 2004, which is now nearly 29 months ago.

11. Since the filing of the Motion for Summary Judgment on March 31, 2006, the Peach Street Diversion, which will relieve the capacity problems that caused the overflows at

both the Larchmont and Beaver Streets area and the Church and Patton and Pershing Streets area, has been completed and is operational.

12. Since the filing of the Motion for Summary Judgment on March 31, 2006, MTSA has continued its investigation and elimination of inflow and infiltration into the sewer system served by the Kearsarge Pump Station. Specifically, MTSA has conducted 267 more inspections and eliminated 11 more illegal connections.

13. Since the filing of the Motion for Summary Judgment on March 31, 2006, MTSA and Millcreek continue to make progress on the overflow retention project at the Kearsarge Pump Station. Presently, construction on one of the two tanks is completed, and construction on the second tank has begun and should be completed early in February 2007. Much of the other work is completed and the only significant work remaining beyond the second tank is the forward pump replacement. The project remains on schedule for completion by March 26, 2007.

14. MTSA and Millcreek seek to supplement their Motion for Summary Judgment and their opposition to Plaintiffs' Motion for Summary Judgment to add these events as further support for the granting of Defendants' Motion and the denial of Plaintiffs' Motion.

15. Attached are the following proposed supplements and accompanying documents: Supplement to Brief in Support of Defendants' Motion for Summary Judgment and Brief in Opposition to Plaintiffs' Motion for Summary Judgment (Exhibit A); Supplement to Concise Statement of Material Facts in Support of Motion for Summary Judgment on Behalf of Millcreek Township Sewer Authority and Millcreek Township (Exhibit B); and Second Supplemental Affidavit of George W. Riedesel (Exhibit C).

Wherefore, Defendants Millcreek Township Sewer Authority and Millcreek Township respectfully request that this Court grant Defendants' Motion to Supplement Defendants' Motion for Summary Judgment and Defendants' Response to Plaintiffs' Motion for Summary Judgment.

Respectfully submitted,

s / Mark J. Shaw

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Dated: February 8, 2007